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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1054

THE CHILDREN OF ISRAEL,
a Corporation,

and

NATHAN MARKS, *et al.*,
Appellants,

v.

SAUL TAMARKIN, *et al.*,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JUBISDICTIONAL STATEMENT.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

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a Corporation,

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NATHAN MARKS, *et al.*,

Appellants,

v.

SAUL TAMARKIN, *et al.*,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of Ohio entered on December 22, 1965, affirming a decree of the Seventh District Court of Appeals which upheld a decree of the Court of Common Pleas of Mahoning County, Ohio.

OPINIONS BELOW.

The opinion of the Court of Common Pleas is not reported. The opinion of the Ohio Seventh District Court of Appeals is officially reported in 2 Ohio App. 2d at page 60.

JURISDICTION.

The decree and opinion of the Mahoning County Court of Common Pleas was entered June 30, 1964 (Appendix pp. 12-14). The opinion of the Seventh District Court of Appeals of Ohio was rendered April 14, 1965, and the final journal entry of that Court was filed and entered May 11, 1965 (Appendix pp. 14-27). The ruling of the Supreme Court of Ohio dismissing the case on the ground that no substantial constitutional question exists and refusing to certify the record was filed on December 22, 1965 (Appendix pp. 27-28). Appellant filed notice of appeal January 13, 1966. This Court has jurisdiction of this appeal under 28 USC 1257 (2); *King Manufacturing Company vs. City Council of Augusta*, 277 U. S. 100. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. *Board of Education vs. Barnette*, 319 U. S. 624 at page 644.

STATUTES INVOLVED.

Ohio Revised Code Sections.

517.23 Disinterment of body buried in cemetery.

"The board of township trustees or the trustees or directors of any cemetery association, or other officers having control and management of a cemetery, shall, on application of the next of kin of the deceased, being of full age, disinter or issue a permit for such disinterment and deliver any body buried in such cemetery to such next of kin, on payment of the reasonable cost and expense of disinterment. No such disinterment shall be made during the months of April, May, June, July, August, and September, and in no event if the deceased died of a contagious or infectious disease, until a permit has been issued by

the board of health of a general health district or of a city health district."

517.24 Form of application

"An application for disinterment under section 517.23 of the Revised Code shall be in writing and shall state the relation of the applicants to the deceased, that the applicants are the next of kin of the deceased, that they are of full age and sound mind, the disease of which the deceased died, where the body shall be reinterred. Such application shall be subscribed and verified by oath."

517.25 Writ of Mandamus

"If the board of township trustees, or the trustees or board of any cemetery association, or other officers in charge of a cemetery, refuse to issue a permit for disinterment after application is made under sections 517.23 and 517.24 of the Revised Code, the court of common pleas of the county in which the cemetery is situated shall issue a writ of mandamus requiring such officers to issue such permit."

QUESTION PRESENTED.

The disinterment statutes of the State of Ohio, Revised Code sections 517.23 and 517.24, allow the next of kin, upon proper application, to remove a body from one cemetery to another. An Orthodox Jewish cemetery resisted an attempt to remove a body from its cemetery on the grounds that such removal was contrary to the basic religious tenets of its faith and belief. Do the Statutes above mentioned, as so construed and applied to appellants and the facts of this case:

1. Violate the First Amendment protection against impairment of the free exercise of religion as absorbed into the Fourteenth Amendment?

STATEMENT OF THE CASE.

The Defendants, the Children of Israel Cemetery, are the owners of an Orthodox Hebrew Cemetery in Youngstown, Ohio. The cemetery is operated and governed by the Orthodox Hebrew faith, and is a part of the Children of Israel Orthodox Temple, in the city of Youngstown, Ohio.

Burial ritual and regulation of burial is governed by the tenets of the Orthodox Hebrew Religion for those who desire to be buried in the consecrated ground of Defendants' cemetery.

A fundamental tenet of the Orthodox Hebrew Religion, prohibition against disinterment, is incorporated in the constitution of the congregation, incorporated in the rules of the Defendants' cemetery, and spelled out in all cemetery deeds of the Defendants. (Deft. ex. 1)

The purpose of spelling out the prohibition against disinterment in all cemetery deeds was to communicate to those who desired to be buried the fact that such burial must be made in accordance with the Orthodox Hebrew faith.

In 1934, Bertha Tamarkin Heselov was buried in the Defendants' cemetery. In 1939, the brother of Bertha Tamarkin Heselov, Isadore Tamarkin, was buried in the Defendants' cemetery. The arrangements for the burial were made by their parents who were of the Orthodox Hebrew faith. When the parents subsequently died, they too were buried in the Defendants' cemetery.

In May, 1963, the surviving brothers and sisters of Bertha Tamarkin Heselov and Isadore Tamarkin made application to the Defendant for permission to disinter the bodies of Bertha Tamarkin Heselov and Isadore Tamarkin. This application was made pursuant to Ohio Revised Code sections 517.23 and 517.24. The applications were denied and a writ of mandamus was sought in the Common Pleas

Court of Mahoning County, Ohio, seeking an order from the court requiring Defendant to disinter the bodies.

The question of an infringement of religious freedom was raised in the testimony of the principal witness for the Defendant, Rabbi Schecter, who, speaking for the Orthodox faith, testified that the rule prohibiting disinterment is a basic precept of the Orthodox religion, and has not been changed for centuries. (R. 44, 45.)

Briefs were filed in the trial court, and the question of infringement of religious freedom was raised. The trial court granted the writ of mandamus as prayed for, and made a finding that no constitutional question existed. An appeal was taken to the Ohio Seventh District Court of Appeals, and briefs were filed by the Defendants raising the constitutional question of infringement of religious freedom contrary to the protections afforded by the First Amendment of the Constitution. The Seventh District Court of Appeals after considering the constitutional question raised by Brief and arguments of counsel, upheld the order of the trial court granting the writ of mandamus and ruled that there was no constitutional question presented. Defendants then filed an appeal to the Supreme Court of Ohio on the ground that the statutes as applied constituted an abridgment of the free exercise of religion as guaranteed by the Federal Constitution, and also seeking in the alternative a writ of certiorari.

Again the question of abridgment of religious freedom contrary to guarantees of the United States Constitution was briefed and argued in the Supreme Court of Ohio. The Supreme Court of Ohio after considering the briefs and arguments dismissed the appeal as not involving any substantial constitutional question and refused to certify the record of the Court of Appeals. Following this ruling of the Supreme Court of Ohio, Defendants filed their notice of appeal to this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

By upholding the disinterment statutes, the courts of Ohio, allowing removal of bodies contrary to the religious beliefs of those who are buried as well as those operating the cemetery, deprives them of the free exercise of their religion. The Ohio Statutes in question grant only a privilege or courtesy to the next of kin, and have nothing to do with public health, safety or morals. Accordingly, the Ohio Courts have ruled, in effect, that a next of kin, by a whim or caprice authorized by statute may compel petitioners to do an act (disinterment) which their religious belief finds repugnant. This is not within the compass of the First Amendment which guarantees freedom of religious belief.

Sherbert vs. Verner, 374 U. S. 398, parallels the case at bar. Sherbert, a Seventh-day Adventist, refused to work on Saturday because it was forbidden by her religion. Unemployment benefits were denied her because she was not "available for work" within the meaning of the South Carolina statute, even though she expressed a willingness to work in any other mill or factory as long as she was not required to work on her Sabbath. The Court held:

> "As so applied, the South Carolina Statute abridged appellant's right to the free exercise of her religion in violation of the First Amendment, made applicable to the States by the Fourteenth Amendment."

Sherbert is practically on all fours with appellants' position in that in both cases the enforcement of a statute as applied in each instance restricted the religious practice of each. The pressure that was applied to forego their practices was unmistakable. The ruling forces appellants herein to be put in a position between obeying a mandate

or following their religious thinking. Governmental imposition of such a choice was not intended by the First Amendment.

Significantly those religions which have no compunctions about disinterment saves such followers from having to make the kind of choice which we feel infringes an Orthodox Jew's religious liberty respecting burials.

It is worthy of comment to note that in the trial below an effort was made by appellees to prove that disinterment was not contrary to the religious belief of an Orthodox Jew despite the testimony of an Orthodox Rabbi to the contrary. Judicial inquiry as to the truth or falsity of religious beliefs is foreclosed to the courts. *U. S. vs. Ballard,* 322 U. S. 78.

The source of the rule prohibiting disinterment emanates from the "Shulhan Aruk." (R. 41.)

Within the framework of Judaism there are many varied laws and customs directing us towards the respect and dignity of the deceased.

Part of these laws and traditions concern themselves with the burial of the dead. These laws and traditions which were adopted by a majority of our people are introduced to us by the Rabbis and sages of Israel with the following declaration, in part: The Jewish faith contends and teaches that the "soul," that which gives life to the mortal body, is eternal, and this "soul" is the direct creation of God Almighty. Consequently the mortal body, which is the repository and depository of the "soul," must be accorded proper respect and dignity, even after the "soul" has departed from it.

The following law is written in the code of Jewish law—Yoreh De-ah, Vol. 2 (Shulhan Aruk), chapter 363, paragraph 1:

"The removal of a buried body or its remains from one grave to another is forbidden, this applies not only from a superior to an inferior grave, but also from an inferior to a superior one." "A body or its remains cannot be removed from one city to another if that body or its remains is buried in a Jewish cemetery."

One of the reasons for the foregoing is, "it is disrespectful and shameful for the memory of the deceased to be moved from one area to another," as the Rabbis quote: "the mortal body deserves eternal peace."

However, the law permits the removal of the body or its remains under the following conditions:

1. If this removal is from a strange cemetery to his *own* designated plot.
2. If the body, or remains, are to be removed for burial in the Holy Land of Israel.
3. If a will was left by the deceased to be removed to a certain specific area.
4. If at the time of burial it was made conditional that the body be reburied in another grave.
5. If his present burial area is threatened by flood or other form of destruction.
6. If it is to be buried near the plot of his parents.

The above laws and the many traditions attached to them have been tenaciously adhered to through the generations by a major segment of our people (except by some reformed Jews), many times under the most trying and difficult circumstances.

These laws and traditions are also found in the Code of Jewish law, Kitzur Shulhan Aruk, Vol. 4, chapter 199, paragraph 11.

The enforcement of the disinterment statutes compelling an Orthodox Jew to do an act contrary to the

tenets of his religion can be likened to a situation where a Catholic is prevented from receiving communion; a Moslem from attending a mosque on Friday and praying five times daily; a Jehovah's Witness from going door to door distributing his religious pamphlets. This could be multiplied a hundred fold. The First Amendment makes sacrosanct this area of privacy and fences it off from any governmental interference. In *West Virginia State Board of Education vs. Barnette,* 319 U. S. 624, the court held that the absolute freedom to believe (*Cantwell vs. Connecticut,* 310 U. S. 296, 303) necessarily means, as a corollary, that *no one can be compelled affirmatively by word or act to do an act conflicting with his religious beliefs.*

The court has even gone so far as to protect the area of privacy in one's religious belief, to the point where judicial inquiry into such privacy is prohibited. In *Barnette, supra,* page 638, the court stated:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The courts have not only stated that government cannot force one into a particular belief but also very zealously insists upon a "hands off" policy. In *Everson vs. Board of Education,* 330 U. S. 1, the opinion, on page 11, points out that the First Amendment embodies the conviction that:

> "* * * individual religious liberty could best be achieved under a government which was *stripped of all power* to tax, to support, or otherwise to assist any

> or all religions, or to interfere with the beliefs of any religious individual or group."

The same absolute nature of the freedom to believe was recognized in *Braunfield vs. Brown*, 366 U. S. 599. The court stated on page 606:

> "Certain aspects of religious exercise cannot in any way be restricted or burdened by either Federal or State legislation."

Like the *Sherbert* case, the appellants if coerced by an affirmative act to disinter, are forced to repudiate their religious beliefs and *a fortiori* it unconstitutionally impairs their guaranteed religious freedom.

In the trial court the appellees attempted to repudiate appellants' version of Orthodox burial precepts by the testimony of one who admitted he was not accepted as an authority on Orthodoxy. The entire extent and purpose of the First Amendment would be thwarted if any court or government agency were given authority to determine what is and what is not rationally tenable as a religious belief. This is a determination that the First Amendment leaves completely within the province of the individual's conscience. A classic maxim in the field of religious liberty is, "The Law Knows no Heresy," *Watson vs. Jones*, 13 Wall. 679, 728; *U. S. vs. Ballard*, 322 U. S. 78, 86.

The sacraments of a religion are its most important elements. To deny one the right to practice same (as long as it does not violate Criminal Statutes or be contrary to public health or welfare) is repugnant to the First Amendment.

If R. C. 517.23 were penal in character, or the health and welfare of the community were involved, then we submit, that the practice of a religious belief would not immunize anyone guilty of violation.

Apparently the Sacrament of burial in orthodoxy parallels the Sacrament of Extreme Unction in Catholicism. To the Orthodox Jew, a deep religious significance attends to burial, in that among other things, it is "an insult to the soul" to have a body removed, except under certain conditions.

If an Orthodox Jew, as part of his belief, felt that once his body is laid to rest it shall remain, then what protection, or peace of mind would he have if he knew that his next of kin could, after death, remove his body? Burial, like marriage, birth and confirmation, are basic tenets of a religion, the absence or denial of which would give religion no significance or efficacy whatsoever.

CONCLUSION.

It is respectfully submitted that the disinterment statutes of the State of Ohio as here construed and applied cannot constitutionally be given effect, and the judgment of the courts of Ohio should be reversed.

MARTIN S. GOLDBERG,
SAMUEL E. KARAM,
Counsel for Appellant.

APPENDIX.

COURT OF COMMON PLEAS JOURNAL ENTRY, CASE NO. 171,707.

Case No. 171,707.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF MAHONING, SS.

SAUL TAMARKIN, *et al.*,

Plaintiffs-Relators,

v.

THE CHILDREN OF ISRAEL, a Corporation,

and

NATHAN MARKS, *et al.*,

Defendants-Respondents.

JOURNAL ENTRY.

(Entered June 30, 1964.)

This cause coming on to be heard on the amended petition herein, the answer thereto, the reply thereto, the evidence, the arguments of counsel and the brief, the Court finds, upon the issues joined, for the plaintiffs-relators, and that no constitutional question exists under Articles I and XIV of the United States Constitution, and that plaintiffs-relators are entitled to a writ of mandamus herein directed to the defendants-respondents as prayed for in the amended petition.

It is therefore ordered that a writ of mandamus be issued against the defendants-respondents, The Children of Israel a Corporation, Nathan H. Marks, Jozef Engle, George Ward, Henry J. Adler, Joseph Mann, Joseph Lehner and Nick Joseph, requiring said defendants-respondents to disinter or issue a permit for the disinterment of the body of Bertha Tamarkin Heselov.

It is further ordered that plaintiffs-relators recover of the said defendants-respondents the plaintiffs-relators' costs herein expended, which are taxed at $_____ for which amount judgment is hereby rendered.

Exceptions to defendants-respondents.

COURT OF COMMON PLEAS JOURNAL ENTRY, CASE NO. 171,708.

Case No. 171,708.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF MAHONING, SS.

BEN TAMARKIN, *et al.*,

Plaintiffs-Relators,

v.

THE CHILDREN OF ISRAEL, a Corporation,

and

NATHAN MARKS, *et al.*,

Defendants-Respondents.

JOURNAL ENTRY.

(Entered June 30, 1964.)

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It is therefore ordered that a writ of mandamus be issued against the defendants-respondents, The Children of Israel a Corporation, Nathan H. Marks, Jozef Engle, George Ward, Henry J. Adler, Joseph Mann, Joseph Lehner and Nick Joseph, requiring said defendants-respondents to disinter or issue a permit for the disinterment of the body of Isadore Tamarkin.

It is further ordered that plaintiffs-relators recover of the said defendants-respondents the plaintiffs-relators' costs herein expended, which are taxed at $ _____ for which amount judgment is hereby rendered.

Exceptions to defendants-respondents.

OPINION OF THE COURT OF APPEALS OF MAHONING COUNTY, OHIO.

(Rendered April 14, 1965.)

SYLLABUS.

1. Ecclesiastical law is not binding on a court, but it may be competent evidence to show customs and wishes of those who observe its mandates.

2. Since Sections 517.23 and 517.24, Revised Code, give the right to next of kin of deceased to make the decision as to disinterment, the burden is upon owners of cemetery objecting to such disinterment to clearly prove their unconstitutionality.

3. Passage of time and the original consent of family of decedents do not affect the constitutionality of Sections 517.23 and 517.24.

4. A cemetery deed containing rules and regulations prohibiting removal of any body buried in said cemetery is in the nature of a private contract, and a private contract cannot nullify an existing state statute.

LYNCH, J.

This is an appeal from an order of the Mahoning County Common Pleas Court issuing a writ of mandamus against the defendants-appellants, the Children of Israel Congregation, and its officers, requiring them to disinter, or to issue a permit for the disinterment of, the bodies of Bertha Tamarkin Heselov and Isadore Tamarkin, who were sister and brother.

In 1934 Bertha Tamarkin Heselov and in 1939 Isadore Tamarkin were buried in a cemetery in Youngstown, Ohio, owned and operated by the Children of Israel Congregation which adheres to the Orthodox Jewish Religion.

Their next of kin, consisting of their brothers and sisters and the husband and children of Bertha Heselov, own lots and a mausoleum in another cemetery in Youngstown, Ohio, owned and operated by the Rodef Sholom congregation which adheres to the Reformed Jewish Religion.

In May 1963 they made application to the defendants-appellants for permission to disinter the above mentioned bodies under authority of Sections 517.23 and 517.24 of the Ohio Revised Code, for the purpose of reinterment in Rodef Sholom Cemetery. The pertinent part of Section 517.23 is as follows:

> "The board of township trustees or the trustees or directors of any cemetery association, or other officers having control and management of a cemetery, shall, on application of the next of kin of the deceased, being of full age, disinter or issue a permit for such disinterment and deliver any body buried in such cemetery to such next of kin, on payment of the reasonable cost and expense of disinterment."

Section 517.24 specifies the form of application under Section 517.23.

The applications were denied and a petition for writ of mandamus was filed.

Defendants-appellants contend that the application of Sections 517.23 and 517.24 of the Ohio Revised Code and the order of the trial court in conformity to these sections are unconstitutional as an attempt to abridge the freedom of religion as guaranteed by the First Amendment and Fourteenth Amendment, Section 1, of the United States Constitution, and by Article I, Section 7, of the Ohio Constitution.

They submitted as evidence a Constitution and By-Laws of the Children of Israel Congregation in which Article XI sets out the following Rules and Regulations of the Cemetery owned and operated by it which are pertinent to this case:

> "Section 12. After a body has been buried in the Cemetery, the same shall forever remain and under no circumstances shall it ever be removed."
>
> "Section 15. All burials in said Cemetery shall conform to the Rules and Regulations of said Cemetery and Congregation and shall be in strict accordance with the Ritual of this Congregation."

The evidence shows that neither Bertha Tamarkin Heselov nor Isadore Tamarkin were members of the Children of Israel Congregation at the time of their deaths. Bertha Tamarkin Heselov was a member of Rodef Sholom Temple and Isadore Tamarkin was a member of Temple Emanuel, which is an orthodox Jewish congregation but adheres to some of the conservative Jewish beliefs. Arrangements for their burial were apparently made by their father, Morris Tamarkin, now deceased, who during his life was a member of Temple Emanuel.

Defendants-appellants submitted testimony that when non-members of their congregation were buried in their

cemetery, they were issued deeds which specifically provided that burial was subject to the rules and regulations of the cemetery and a copy of the rules and regulations, including the above mentioned rules, was attached to the deed. Harold Schechter, Rabbi of Temple Emanuel, testified that the Orthodox Jewish Religion prohibits the disinterment of bodies buried in an Orthodox Jewish cemetery except (1) when there is a stipulation in the Will of the person involved, (2) when the body is to be removed for burial in Israel and (3) when the bodies of husband and wife are buried in separate cemeteries. He further testified that it was contrary to Jewish law for a brother to disinter a brother for the purpose of burial in another cemetery.

Plaintiffs-appellees submitted testimony of Sidney M. Berkowitz, Rabbi of Rodef Sholom Temple, who testified that in a digest of Orthodox Jewish Law called Shulchan Aruch under Yoreh De-ah, Chapter 363, Paragraph 1, appears the following quotation:

> "It is unlawful to remove the body, or the remnants of bones, from one place to another, whether from an honorable place to an equally honorable one, or from a lowly place to an honorable one, not to speak of the reverse. It is, however, permissible to remove the same if the dead is to be re-interred among his own; for it is pleasant for a man to repose alongside his fathers."

Rabbi Berkowitz stated that the purpose of Jewish law on disinterment was basically not to disturb the dead; that indiscriminate disinterment is discouraged and that the Reformed Jewish Religion permits disinterment when the deceased is to be reburied next to family. It was his opinion that the spirit and text of Jewish law was not being violated by a request to disinter in order to rebury

next to brothers and sisters. He also stated that the Orthodox law on disinterment has been the subject of debate among Orthodox Rabbis and cited Rabbi Moses Sofer, 1763-1835, Germany, in his book Hatam Sofer, Volume VI, Page 37, in which Jewish law was interpreted to permit interment and called it a meritorious act, particularly when the removal is of benefit to the dead and would be presumably desired by him. Rabbi Berkowitz also said that in 1960 a daughter requested that the body of her father who was buried in 1947 in the Alliance Orthodox Jewish Cemetery be disintered and reburied in the Rodef Sholom Cemetery. The Alliance Orthodox Church, who had a similar provision against disinterment, after consultation with the Orthodox Rabbi of Canton, Ohio, granted permission on the grounds that the deceased was being reburied with family and that the civil law supersedes religious law.

Rabbi Berkowitz also testified that one of the basic laws applying to all Jewish religions was that civil law takes precedence over religious law, and cited as authority the following quotation from the Talmud in Baba Barthra as translated by Marcus Jastrow in a Dictionary of Talmudic Terms, page 301:

> "The law of the secular government is law, must supersede the Jewish law in civil affairs."

Rabbi Schechter testified that this only applied to rules that emanate from custom and tradition rather than basic tenets of their religion and that this issue involved a basic tenet of their religion.

A research of the law applicable to this case indicates that there are no reported Ohio cases on the issues raised here. None of the briefs of the respective parties contained any such Ohio cases.

The defendants-appellants cited the following cases in which the courts refused the disinterment of bodies buried in Orthodox Jewish Cemeteries because disinterment would transgress a cardinal principle of Orthodox Jewish religion and would constitute a desecration of the holy burial ground. *Seiffer v. Schwimmer* (1937), 166 Misc. 329, 1 N. Y. S. (2d) 730; *Klahr v. Nadel* (1937), 166 Misc. 288, 1 N. Y. S. (2d) 733; *In re: Weinstein,* 243 App. Div. 788, 277 N. Y. S. 425; *Goldman v. Mollen* (1937), 168 Va. 345, 191 S. E. 627.

They also cited the following cases in which the courts refused the disinterment of bodies buried in Catholic cemeteries for reburial in non-Catholic cemeteries. *Yome v. Gorman* (1926), 242 N. Y. 395; 152 N. E. 126, 47 A. L. R. 1165; *Ingraffia v. Dougherty* (1944 Pa.), 29 North Co. R. 294.

The above cited cases hold that ecclesiastical law is not binding on a court, but it may be competent evidence to show customs and wishes of those who observe its mandates. These cases seem to turn on the fact that the deceased were devout members of their respective religions, and the presumption would be that their wishes were that their remains should be treated in accordance with the rules of their religion.

However, the wishes of the next of kin have also to be taken into consideration. *In re: Katz* (1938), 167 Misc. 301, 3 N. Y. S. (2d) 754, where it appeared that the original burial in an orthodox Jewish cemetery was intended to be temporary, application by husband for disinterment of the body of his wife for reburial in a family plot in another Jewish cemetery was granted.

In *Application of Sherman* (1951), 107 N. Y. S. (2d) 905, a widow's application for removal of her husband's body from one hallowed Jewish cemetery to another

hallowed Jewish cemetery in which the widow wished to be buried was granted, notwithstanding the opposition of the Synagogue to such disinterment. The court said "the laws and usages of the religious body must at times be subordinated to the feelings of the survivors." See also *Herzl Congregation v. Robinson* (1927), 142 Wash. 769, 253 Pacific 654.

However, neither New York, Virginia, nor Pennsylvania have statutes similar to Sections 517.23 and 517.24 of the Ohio Revised Code granting the next of kin the right to disinter a body buried in a cemetery. There is an extensive review and compilation of cases on this subject in 21 *A. L. R.* (2d) 472, but of the cases cited in this article, only Ohio has statutes such as the one at issue in this case.

When the legislature is silent, the courts may declare the public policy and mark out the lines of natural justice; but when the legislature has spoken, within the powers conferred by the Constitution, its duly enacted statutes form the public policy and prescribe the rights of the people, and such statutes must be enforced, and not nullified by the judicial and executive departments of this state. In this regard the legislature is supreme, and the presumption is that it will do no wrong and will pass no unjust laws. *Probasco v. Raine,* 50 Ohio St. 378 at 391, 34 N. E. 536.

It is axiomatic that courts must always indulge in a strong presumption in favor of the constitutionality of legislation, and that a court will not pass upon the constitutionality of a statute or ordinance unless or until it becomes necessary to do so in order to dispose of the case before it. *American Cancer Society v. Dayton,* 160 Ohio St. 114 at page 121, 51 Ohio Opinions 32, 114 N. E. (2d)

219. See also 16 *Am. Jur.* (2d), Constitutional Law, Section 137, page 336.

In order that a statute shall fall because it is in conflict with the Constitution, it is necessary that conflict shall be so clear and irreconcilable that both Constitution and Statute cannot operate at the same time and upon the same subject matter. It has been further repeatedly held that the word "clear," as herein used, must be "beyond a reasonable doubt"; that if any doubt exists as to whether or not the statute is irreconcilably in conflict such doubt is to be resolved in favor of the validity of the statute. *State ex rel. Doerfler v. Price,* 101 Ohio St. 50 at 53, 128 N. E. 173; *State ex rel. Dickman v. Defenbacker,* 164 Ohio St. 142, 57 Ohio Opinions 134, 128 N. E. (2d) 59; *City of Xenia v. Schmidt,* 101 Ohio St. 437, 130 N. E. 24; *Miami County v. Dayton,* 92 Ohio St. 215, 110 N. E. 726; *State ex rel. Ach v. Evans,* 90 Ohio St. 243, 107 N. E. 537.

Where a statute is challenged on the ground that it is unconstitutional when applied to a particular state of facts, the burden rests upon the party making such attack to present clear and convincing evidence of a presently existing state of facts which makes the act unconstitutional and void when applied thereto. *Belden v. Union Cent. Life Ins. Co.,* 143 Ohio St. 329 at 349, 28 Ohio Opinions 295, 55 N. E. (2d) 629; *Dayton v. S. S. Kresge Co.,* 114 Ohio St. 624, 151 N. E. 775, 53 A. L. R. 916; *State ex rel. Ohio Hair Products Co. v. Rendigs,* 98 Ohio St. 251, 120 N. E. 836. See also 16 *Am. Jur.* (2d), Constitutional Law, Section 172, pages 390-392.

Since the defendants-appellants are challenging the validity of Sections 517.23 and 517.24 in their application to this case, the burden is upon them to clearly prove their unconstitutionality. The trial court has held that no constitutional questions exist in this case.

It is obvious that there are honest differences in the beliefs of the various branches of the Jewish religion on the matter of disinterment in the fact situation of this case; however, we feel that the determination of this case does not hinge on who is the correct spokesman for the respective branches of the Jewish religion but rather on what group has the right to make the decisions as to disinterment.

Sections 517.23 and 517.24 gives this right to the plaintiffs-appellees as next of kin. They also are Jewish and obviously find no conflict with these statutes and their religious beliefs.

The defendants-appellants contend that the application of these statutes in this case is contrary to the religious beliefs of the Orthodox Jewish religion and is, therefore, an unconstitutional interference with their religious beliefs.

In states without statutes such as Ohio, the general rule seems to be that the religious objections of the owners of a cemetery would not prevent an application for disinterment of a body by next of kin unless the religious objections can be identified as the beliefs and wishes of the deceased. Besides the wishes of the deceased there are to be considered the religious sensibilities of his next of kin. 21 *A. L. R.* (2d) 498 and 507.

Defendants-appellants' position appears to be that they represent the beliefs and desires of the persons buried in their cemetery rather than the next of kin. They argue that the desires of persons buried in their cemetery have their origins in deep religious beliefs and feelings, that the wishes of the individuals to be buried in this cemetery stood unchanged for thirty years, and that the original burials in the holy ground in this cemetery had the approval and consent of the entire family of decedents.

The passage of time and the original consent of the family of decedents are factors that are considered in states without comparable statutes such as Ohio, but we feel that such factors could not affect the constitutionality of these statutes.

The sole remaining consideration is whether the defendants-appellants represent the beliefs and wishes of the deceased rather than the plaintiffs-appellees. There is nothing in the record to indicate that either of the deceased left any expression either by will or otherwise as to where they should be buried.

Since Bertha Tamarkin Heselov was a member of Rodef Sholom congregation and since the Rabbi of this congregation testified that the spirit and text of Jewish religion was not being violated by a request to disinter in order to rebury next to brothers and sisters, we feel that the application of Sections 517.23 and 517.24 for disinterment of her body for reburial in the cemetery of her congregation next to her brothers and sisters would not violate her religious beliefs.

The body of Isadore Tamarkin presents a different story. He was a member of Temple Emanuel, and the Rabbi of this congregation testified that it was contrary to Jewish law for a brother to disinter a brother for the purpose of burial in another cemetery. However, no testimony was offered as to Isadore Tamarkin's personal adherence to this belief while testimony was offered that even among Jewish Orthodox Rabbis there is no universal agreement on this particular tenet.

The fact that several cases have arisen in various states over disinterment from Jewish Orthodox Cemeteries show that certain members of the Jewish Orthodox religion do not share this belief.

We accord due respect to Rabbi Schechter as an able

spokesman for his congregation, but at best his testimony creates an inference that Isadore Tamarkin's religious beliefs would be opposed to disinterment of his remains. However, Isadore Tamarkin was dead and buried many years before Rabbi Schechter came to Youngstown. His brothers should be in a better position to know his religious beliefs on disinterment, and their actions in this case indicate that their religious beliefs on disinterment are contrary to those of Rabbi Schechter.

Since there is no direct evidence that the religious beliefs of Isadore Tamarkin on disinterment were contrary to those of his next of kin, the Court is confronted with another possible inference that Isadore Tamarkin's religious views on disinterment would be similar to his next of kin.

We conclude that defendants-appellants have not clearly proven that the religious beliefs of Isadore Tamarkin on disinterment would be violated by the application of Sections 517.23 and 517.24.

Since there was no clear proof that the religious beliefs and wishes of the deceased were against the wishes of the next of kin to disinter their bodies, this issue is not before this Court and we cannot consider what effect this would have had in this case.

Among the exhibits of the defendants-appellants in this case is a blank deed form which defendants-appellants explained was regularly used when non-members purchased lots in the cemetery. This deed form has attached to it a copy of the rules and regulations of the Children of Israel Cemetery, which prohibit removal of any body buried in this cemetery.

We hold that the issuance of such a deed to a non-member of the congregation was in the nature of a private

contract, and a private contract cannot nullify an existing state statute.

It is elementary that no valid contract may be made contrary to statute. *Bell v. Northern Ohio Tel. Co.*, 149 Ohio St. 157 at 158, 36 Ohio Opinions 501, 78 N. E. (2d) 42; *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406, 54 N. E. 372.

See also 11 *Ohio Jurisprudence* (2d), Contracts, Section 93, page 331, and Section 123, page 366.

We, therefore, hold that the application of Sections 517.23 and 517.24 of the Ohio Revised Code to the instant case is not unconstitutional.

The judgment of the Mahoning County Common Pleas Court is, therefore, affirmed.

APPROVED:

JOHN J. LYNCH,
Judge.

JOHNSON, *P. J.*, Concurs.
JONES, *J.*, Concurs.

COURT OF APPEALS JOURNAL ENTRY, CASE NO. 4493.

(Entered May 11, 1965.)

This cause came on for hearing on the appeal on questions of law, assignment of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Mahoning County, and was argued by counsel for the parties; and upon consideration thereof, the Court finds that since there was no clear proof that the religious beliefs and wishes of the deceased were against the wishes of the next of kin to disinter the body of the deceased, such issue is not before this Court, and this Court cannot consider what effect this

would have had in this case; finds that the application of Sections 517.23 and 517.24 of the Revised Code to the instant case is not unconstitutional; and finds that there is no error prejudicial to the appellants apparent on the record in said proceedings and judgment.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is, hereby affirmed, and that the appellees recover from the appellants their costs herein taxed. And the Court, being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

To all of which appellants, by their counsel, except.

COURT OF APPEALS JOURNAL ENTRY, CASE NO. 4494.

(Entered May 11, 1965.)

This cause came on for hearing on the appeal on questions of law, assignment of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Mahoning County, and was argued by counsel for the parties; and upon consideration thereof, the Court finds that since there was no clear proof that the religious beliefs and wishes of the deceased were against the wishes of the next of kin to disinter the body of the deceased, such issue is not before this Court, and this Court cannot consider what effect this would have had in this case; finds that the application of Sections 517.23 and 517.24 of the Revised Code to the instant case is not unconstitutional; and finds that there is no error prejudicial to the appellants apparent on the record in said proceedings and judgment.

It is, therefore, considered by the Court that the judgment of the Court of Common Pleas be, and the same is, hereby affirmed, and that the appellees recover from the appellants their costs herein taxed. And the Court, being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

To all of which appellants, by their counsel, except.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY.

(Entered December 22, 1965.)

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR MAHONING COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT.

(Entered December 22, 1965.)

This cause, here on appeal as of right from the Court of Appeals for Mahoning County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment

into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

MANDATE OF THE SUPREME COURT OF OHIO.

To the Honorable Court of Common Pleas Within and for the County of Mahoning, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, for the reason that no substantial constitutional question exists herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1054.

THE CHILDREN OF ISRAEL,
a Corporation, *et al.*,
Appellants,

vs.

SAUL TAMARKIN, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS APPEAL.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

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THE CHILDREN OF ISRAEL,
a Corporation, *et al.*,
Appellants,

vs.

SAUL TAMARKIN, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

MOTION TO DISMISS APPEAL.

Appellees move the Court to dismiss the appeal herein on the following grounds:

(a) The appeal is not within the jurisdiction of this Court because not taken in accordance with the Revised Rules of this Court.

(b) The appeal does not present a substantial federal question.

(c) The federal question sought to be reviewed was not timely or properly raised.

I. THE APPEAL WAS NOT TAKEN IN CONFORMITY TO THE REVISED RULES OF THIS COURT.

Revised Rule 10 (2)(a) of this Court provides that the notice of appeal shall designate the judgment appealed from.

The notice of appeal sets forth an appeal "from the final judgment of the Supreme Court of the State of Ohio, affirming the judgment of the Seventh District Court of Appeals of Ohio, which affirmed the decree of the Court of Common Pleas for Mahoning County, Ohio, dated and entered in this action on December 22, 1965."

As the record before this Court and appellants' Jurisdictional Statement show, the Supreme Court of the State of Ohio did not enter any judgment and did not affirm the judgment of any lower court. Instead, the Ohio Supreme Court merely overruled a motion for an order to certify the record, and *sua sponte* dismissed the appeal which had been filed in that Court. (Jurisdictional Statement, pp. 27-28.) The appellants have thus attempted to appeal from a nonexistent judgment.

Without intending to waive our objection to the notice of appeal, we will assume throughout the remainder of the brief in support of these motions that the appellants intended to appeal from the judgment of the Seventh District Court of Appeals of Ohio.

We wish also to call to the attention of this Court the following two other peculiarities in the form of this appeal which make it difficult for appellees to know what matters appellants are attempting to bring to the attention of this Court.

This Court's Rule 10 (2)(a) requires the notice of appeal to specify the party or parties taking the appeal. The notice of appeal specifies as such party or parties only "Children of Israel Congregation, *et al.*" The Jurisdictional Statement, however, also lists Nathan Marks as an appellant. Under these circumstances, we are uncertain as to whether Mr. Marks is properly before this Court as an additional appellant.

The record which the appellants filed with this Court does not contain any of the pleadings and does not contain any of the testimony or other evidence. This resulted from appellants' listing in the designation of record of the following items: "Transcript of record filed in the Supreme Court of Ohio," and "Bill of Exceptions filed in the Supreme Court of Ohio." But no transcript of record and no bill of exceptions had ever been filed in the Supreme Court of Ohio, and, accordingly, those portions of the designation of record referred to nonexistent papers.

We notice that the Jurisdictional Statement filed by appellants makes several references to exhibits, and to pages of the record and to pleadings or briefs, but none of those documents was included in the record before this Court. Appellants appear to be asking this Court to determine this case in a vacuum, without presenting to this Court the facts upon which the appellants' assertions are based.

II. APPELLANTS HAVE NOT ASSERTED ANY CONSTITUTIONAL RIGHT OR IMMUNITY.

A religious belief by a party to litigation merely that other persons should engage, or refrain from engaging, in certain conduct does not give that party any standing under the First Amendment. Before the Constitutional effect of proposed state action can be considered, a party must satisfy the threshold requirement—he must allege and prove that the state action will infringe *his own* religious freedom. As this Court said in *McGowan v. Maryland*, 366 U. S. 420 (1961), one of the Sunday closing cases:

> "But appellants * * * do not allege any infringement of their own religious freedoms due to Sunday clos-

> ing. * * * Since the general rule is that 'a litigant may only assert his own constitutional rights or immunities' * * * we hold that appellants have no standing to raise this contention." (p. 429.)

There is nothing in the record whereby appellants have asserted that application of the Ohio disinterment statutes in the present situation will interfere with their own religious freedom.

The Question Presented, set forth in appellants' Jurisdictional Statement, asserts that "An Orthodox Jewish cemetery resisted an attempt to remove a body from its cemetery on the grounds that such removal was contrary to the basic religious tenets of its faith and belief," but there is no assertion that such removal would violate the conscience of any particular person. On page 5 of the Jurisdictional Statement, appellants assert that one Rabbi Schecter testified that the rule prohibiting disinterment is a basic precept of the Orthodox religion. As the Opinion of the Court of Appeals states (Jurisdictional Statement, pp. 16-17), Rabbi Schecter is not affiliated with the appellant cemetery but is, instead, the rabbi of a different congregation, Temple Emanuel. In effect, appellants asked the Courts below to determine by means of expert testimony what Orthodox Jewish law is on the subject of disinterment, and then to enforce that law against the appellees, who are persons not subscribing to Orthodox doctrines.

We respectfully submit that the First Amendment of the Constitution of the United States does not permit a cemetery to interfere with the rights given by society to others simply because the cemetery believes that religious law gives it a right to do so. If the rule were otherwise, any religious body could with impunity nullify many types of statutory and common law rights of other persons

by showing a religious belief that such rights of other persons should be abridged. Such a result would appear to be the "establishment of religion" which is itself unconstitutional under the First Amendment.

Where, as here, there is nothing in the record which would show that state action would infringe the religious freedom of any appellant, the appellants have not met the threshold requirement and have no standing to raise the Constitutional question.

III. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

There is nothing in the record which would indicate that the deceased or any member of the deceased's family was a member of the Children of Israel Congregation. There is nothing in the record indicating that the deceased wished to be buried in the cemetery operated by that Congregation or concerning their beliefs about disinterment. Even if a Constitutional question had been properly raised below, the only interested persons whose religious sensibilities could be offended by disinterment are the proprietors of the cemetery.

The Ohio statutes pursuant to which appellees brought this action create in appellees an unqualified right to have the bodies disinterred. The statutes are applicable to all next of kin regardless of their religion. They were passed long before either of the bodies in question was accepted by the cemetery for burial.

The appellants now contend that these statutes violate that portion of the First Amendment of the United States Constitution which states that Congress shall make no law "prohibiting the free exercise" of religion.

In so arguing, the appellants ignore the distinction between statutes which affect the right of persons to be-

lieve as they wish, and statutes which merely regulate conduct in order to protect rights of others. This Court has consistently pointed to this important distinction. In *Cantwell v. Connecticut*, 310 U. S. 296 (1940), this Court said of the First Amendment:

> "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. *The first is absolute but, in the nature of things, the second cannot be.* Conduct remains subject to regulation for the protection of society." (pp. 303-304.) (Emphasis supplied.)

In *Davis v. Beason*, 133 U. S. 333 (1890), this Court stated that the Amendment

> "was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, *not injurious to the equal rights of others*, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." (p. 343.) (Emphasis supplied.)

The Ohio statutes have no effect upon the freedom of anyone to believe as he chooses, or to attempt to convert others to his beliefs. They serve only to create a right in other persons, the next of kin, and to provide a means of enforcing that right.

The cases referred to by appellants are not relevant to the present case. *United States v. Ballard*, 322 U. S. 78 (1944) held only that a court may not question the sincerity with which a religious belief is held. No such question has been raised in this case.

Sherbert v. Verner, 374 U. S. 398 (1963), also relied upon by appellants, held that the denial of unemployment

nsation to one who, because of religious conviction, not work on Saturday violated the First Amend- ecause it met two conditions, neither of which has net by appellants in the present case.

rst, a burden on the free exercise of her religion posed upon the appellant in that case by the denial of state benefits given to persons without her reli- cruples. By contrast, the religious beliefs of appel- n the present case do not result in their receiving eatment by the state different from that accorded to s without their beliefs.

econd, in *Sherbert*, this Court found that the action state did not serve to enforce any compelling state t. It contrasted the situation before it with that had been presented in another of the Sunday closing s follows:

"In these respects, then, the state interest as- rted in the present case is wholly dissimilar to the terests which were found to justify the less direct rden upon religious practices in Braunfeld v. rown, 366 U. S. 599 (1961). The Court recognized at the Sunday closing law which that decision sus- ined undoubtedly served 'to make the practice of he Orthodox Jewish merchants') * * * religious eliefs more expensive,' 366 U. S., at 605. But the atute was nevertheless saved by a countervailing ctor which finds no equivalent in the instant case— strong state interest in providing one uniform day rest for all workers. That secular objective could achieved, the Court found, only by declaring Sun- y to be that day of rest." (p. 407.)

t in the present case the Ohio Legislature was rec- g and giving effect to a proper interest when it d to the next of kin the right to compel disinter- Even in jurisdictions which do not have a statute

such as Ohio's, the legitimate interest of the next of kin has always been considered in cases involving disinterment. Cf. *Yome v. Gorman,* 242 N. Y. 395, 152 N. E. 126 (1926). It was not unreasonable for the Ohio Legislature to express the public policy of this State by making unconditional the right of the next of kin.

If the position of the appellants was adopted, the feelings and wishes of the next of kin could no longer be taken into account in any state, whenever the cemetery authorities asserted opposition to disinterment, based upon religious grounds. In such cases only the wishes of the cemetery authorities could be considered, and the state would be prohibited from protecting the legitimate interest of the next of kin.

There are other times when a state may find it necessary to require bodies to be disinterred. The exercise of eminent domain serves as an example. Yet, if the appellants were correct in their contention that bodies may never be disinterred when contrary to the religious laws of the cemetery owners, all governments could be effectively prevented from ever removing bodies in order to use cemetery lands for a public purpose. This is not the law. See *United States v. Sixty Acres,* 28 F. Supp. 368 (E. D. Ill. 1939) in which the court said:

> "That it must be the law that lawful governmental progress or functions cannot be stayed by giving public cemeteries a permanently inviolable locus perpetually beyond the reach of the sovereign power of eminent domain, whether exercised by state or government, is apparent to one who gives the subject any mature consideration. That such is the accepted law is apparent from the very fact that great governmental projects, like the Norris Dam in Tennessee, similar in their essential physical needs and results to the project here involved, could not and would not

have been constructed had the law prevented the condemnation of public cemeteries and the removal of the bodies of the dead therefrom."

The interest of the next of kin should be considered as legitimate a subject for state protection as the interest of the public in making improvements through the use of the power of eminent domain. We respectfully submit that the conduct of cemetery authorities is subject to regulation by the Legislature in enforcing rights belonging to other persons.

IV. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED.

The appellants have not filed in this Court the pleadings or proceedings in the trial court, the Court of Common Pleas. There is nothing before this Court to show that the alleged Constitutional question was presented to that Court. That Court did, in its journal entries, expressly find that no Constitutional question *exists* under Articles (Amendments) I and XIV of the United States Constitution.

CONCLUSION.

It is respectfully submitted that this appeal should be dismissed for each of the reasons set forth in the foregoing motion.

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